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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

16 MICHELLE MAZUR, On Behalf of  
17 Herself and all Others Similarly  
Situated,

Case No. C 07 3967 MHP

18 Plaintiff,  
19 v.  
20 **EBAY, INC., HOT JEWELRY**  
21 **AUCTIONS.COM d/b/a JEWELRY**  
22 **OVERSTOCK AUCTIONS.COM d/b/a**  
**PARAMOUNT AUCTIONS, and DOES**  
**1-100, inclusive**

**MEMORANDUM OF LAW  
IN OPPOSITION TO  
DEFENDANT EBAY'S  
MOTION TO DISMISS  
COMPLAINT PURSUANT  
TO FED. R. CIV. P. § 12(b)(6)**

23 || Defendants

28 //

## **TABLE OF CONTENTS**

2	PRELIMINARY STATEMENT.....	1
3	STATEMENT OF FACTS .....	1
4	ARGUMENT .....	1
5	I.    The Complaint States a Claim for Relief Based on Fraud and Deceit.....	1
6	A.    The Communications Decency Act Does Not Immunize eBay from	
7	Consumer Fraud.....	2
8	B.    eBay is Attempting Improperly to Convert the CDA from a Shield into a	
9	Sword in the Service of Fraud.....	4
10	C.    The User Agreement Does Not Shield eBay from Liability for its	
11	Misconduct.....	5
12	D.    eBay Should Be Held Liable for its Unjust Enrichment and Negligence ....	6
13	E.    Plaintiff's Fraud Claim Is Properly Alleged .....	7
14	II.    Prayer for Right to Amend in the Alternative.....	8
15	CONCLUSION.....	9

## **TABLE OF AUTHORITIES**

## Cases

3	<i>Anthony v. Yahoo! Inc.</i> , 421 F. Supp.2d 1257 (N.D. Cal. 2006).....	3, 8
4	<i>Balistreri v. Pacifica Police Dep't</i> , 901 F.2d 696 (9th Cir. 1988) .....	1
5	<i>Blumenthal v. Drudge</i> , 992 F. Supp. 44 (D.D.C. 1998).....	3
6	<i>Carafano v. Metrosplash.com, Inc.</i> , 339 F.3d 1119 (9th Cir. 2003).....	3
7	<i>Dinosaur Dev. Co. v. White</i> , 216 Cal. App. 3d 1310 (Cal. Ct. App. 1989) .....	7
8	<i>Eminence Capital, LLC v. Aspeon, Inc.</i> , 316 F.3d 1048 (9th Cir. 2003) .....	8
9	<i>Erlich v. Menezes</i> , 21 Cal. 4th 543 (Cal. 1999) .....	7
10	<i>Ford v. Shearson Lehman American Express, Inc.</i> , 180 Cal. App. 3d 1011 (Cal. Ct. App. 1986)..	6
11	<i>Frank v. Tavares</i> , 142 Cal. App. 2d 683 Cal. Ct. App. 1956) .....	7
12	<i>Hotels Nevada v. L.A. Pacific Center, Inc.</i> , 144 Cal. App. 4th 754 (Cal. Ct. App. 2006).....	6
13	<i>Ind. Bell Tel. Co. v. Ward</i> , No. IP 02-170-C H/K, 2002 WL 32067296 (S.D. Ind. 2002) .....	8
14	<i>Katz v. A.J. Ruhlman &amp; Co.</i> , 69 Cal. App. 2d 541 (Cal. Ct. App. 1945).....	4
15	<i>Lauriedale Associates, Ltd. v. Wilson</i> , 7 Cal. App. 4th 1439 (Cal. Ct. App. 1992).....	7
16	<i>Leong v. Potter</i> , 347 F.3d 1117 (9th Cir. 2003) .....	4
17	<i>McBride v. Boughton</i> , 123 Cal.App.4th 379 (Cal. Ct. App. 2004) .....	6
18	<i>Robertson v. Dean Witter Reynolds, Inc.</i> , 749 F.2d 530 (9th Cir. 1984) .....	1
19	<i>Santa Maria v. Pacific Bell</i> , 202 F.3d 1170 (9th Cir. 2000) .....	5
20	<i>Tresway Aero. Inc. v. Superior Court</i> , 5 Cal.3d 431 (Cal. 1971) .....	4
21	<i>Zeran v. America Online, Inc.</i> , 129 F.3d 327 (4th Cir. 1997).....	3

## Statutes

23	Communications Decency Act, 47 U.S.C. § 230.....	1, 2, 3, 5
24	Fed. R. Civ. P. Rule 15(a) .....	8

1 Plaintiff Michele Mazur (“Plaintiff”), by her attorneys, Matthew A. Siroka and Balestrieri  
 2 PLLC, respectfully submits this Memorandum of Law in opposition to Defendant eBay’s (“eBay”)  
 3 or “Defendant” Motion to Dismiss the Complaint dated August 30, 2007 (“Complaint”),  
 4 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

5 **PRELIMINARY STATEMENT**

6 Defendant’s Motion to Dismiss the Complaint rests on a fundamental misunderstanding of  
 7 Plaintiff’s allegations. Defendant asserts, under its own user agreement and under the  
 8 Communications Decency Act (the “CDA”), 47 U.S.C. § 230, that Defendant “cannot be held  
 9 liable under any theory merely for being a conduit of the misrepresentations and other alleged  
 10 improper conduct” of its co-Defendant Hot Jewelry Auctions (“HJA”). (Def. eBay’s Mot.  
 11 Dismiss 6.)

12 However, Plaintiff’s allegations are not that Defendant should be held liable for being a  
 13 mere conduit but, that Defendant’s should be held liable for its own knowing fraudulent  
 14 misrepresentations. Defendant’s self-serving arguments all rest on this fundamental flaw and  
 15 Defendant’s motion should be denied. <sup>1</sup>

16 **STATEMENT OF FACTS**

17 For a complete rendition of the facts alleged, Plaintiff respectfully refers the Court to the  
 18 Complaint.

19 **ARGUMENT**

20 **I. THE COMPLAINT STATES A CLAIM FOR RELIEF BASED ON FRAUD AND  
 21 DECEIT**

22 Defendant has an extremely high standard to meet, as dismissal under Rule 12(b)(6) is  
 23 proper only when a complaint exhibits either a “lack of a cognizable legal theory or the absence  
 24 of sufficient facts alleged under a cognizable legal theory.” *Balistrieri v. Pacifica Police Dep’t*,  
 25 901 F.2d 696, 699 (9th Cir. 1988) (citing *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530,  
 26 533–34 (9th Cir. 1984)). In addition, the Court must accept the facts alleged in the complaint as

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27  
 28 <sup>1</sup> Plaintiff does not challenge Defendant’s contemporaneously filed request for Judicial Notice  
 dated October 26, 2007.

1 true. *See id.*

2       **A. The Communications Decency Act Does Not Immunize eBay from**  
 3       **Consumer Fraud**

4       Defendant asserts that the CDA enables eBay to knowingly make misleading and  
 5 fraudulent statements to consumers for profit. The CDA does not shield Defendant for its own  
 6 liability arising from its own statements, vouching for HJA, and affirming the safety of what it  
 7 knows to be an avenue for perpetrating fraud. The CDA provides in pertinent part that no  
 8 “interactive computer service” will be liable for publication of “any information provided by  
 9 *another* information content provider” 47 U.S.C. § 230(c)(1) (emphasis added). An “interactive  
 10 computer service” is “any information service, system, or access software provider that provides  
 11 or enables computer access by multiple users to a computer server, including specifically a  
 12 service or system that provides access to the Internet and such systems operated or services  
 13 offered by libraries or educational institutions.” 47 U.S.C. § 230(f)(2). An “information content  
 14 provider” is “any person or entity that is responsible, in whole or *in part*, for the creation or  
 15 development of information provided through the Internet or any other interactive computer  
 16 service.” 47 U.S.C. § 230(f)(3) (emphasis added).<sup>2</sup>

17       Plaintiff’s complaint alleges that eBay—not *Hot Jewelry Auctions*—misleads consumers  
 18 by vouching for live auctions, saying they are “very safe,” “carefully screened,” and “conducted  
 19 by reputable auction houses.” (Compl. ¶¶ 30–34.) eBay makes such statements in order to  
 20 increase its own profits. (Compl. ¶¶ 57–66.) Thus, eBay’s statements are not a mere publication  
 21 of another Internet content provider’s words. Rather, eBay acts as an Internet content provider  
 22 itself by making its own false statements regarding the service that eBay provides. The CDA  
 23 offers it no protection.

24       The fact that HJA is also committing fraud does not absolve eBay “from liability for any

25       <sup>2</sup> eBay may simultaneously be both an “information content provider” and an “interactive  
 26 computer service” provider. *See Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1263 (N.D. Cal.  
 27 2006) (citing *Gentry v. Ebay, Inc.*, 99 Cal. App. 4th 816, 833 (Cal. Ct. App. 2002) (“It is not  
 28 inconsistent for eBay to be an interactive service provider and also an information content  
 provider; the categories are not mutually exclusive. The critical issue is whether eBay acted as an  
 information content provider with respect to the information that appellants claim is false or  
 misleading.”)).

1        accompanying misrepresentations.” *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1263 (N.D.  
 2        Cal. 2006). In *Anthony*, Yahoo! Inc. (“Yahoo”) was found to be both an “information content  
 3        provider” and an “interactive computer service.” *Id.* Yahoo could not escape liability pursuant to  
 4        a motion to dismiss by publishing third party created Internet profiles while additionally making  
 5        fraudulent misrepresentations about such profiles. *See id.* The court in *Anthony* expressly rejected  
 6        Yahoo’s position, which is identical to eBay’s. Both Yahoo and eBay had partners in fraud, but  
 7        in both cases they cannot seek absolution merely because their partners also committed fraud—  
 8        Yahoo and eBay themselves made fraudulent statements. The court even distinguished the same  
 9        cases eBay cites in its Motion to Dismiss. *See id.*

10        Indeed, eBay can provide no case to support its fantastic claim that the CDA immunizes  
 11        eBay from its *own* fraudulent misconduct. Each and every case that eBay cites involves the CDA  
 12        applying to a publication of *another* party’s statements. *See, e.g., Carafano v. Metrosplash.com,*  
 13        *Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (CDA applies to negligence claims against an Internet  
 14        dating service relating to a third party’s creation of false profile using plaintiff’s identity); *Zeran*  
 15        *v. America Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997) (America Online sued for failing to  
 16        remove a posting by *another* party on an Internet bulletin board); *Blumenthal v. Drudge*, 992 F.  
 17        Supp. 44, 50 (D.D.C. 1998) (America Online sued for statements made by *another* party: gossip  
 18        columnist Matt Drudge). The CDA protects parties who distribute statements, not those who  
 19        make the statements themselves.

20        eBay relies on *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 (Cal. Ct. App. 2002), to  
 21        support the bizarre assertion that Plaintiff cannot “circumvent” the CDA by “alleging (i) that  
 22        eBay affirmatively misrepresented the safety of live auctions accessed via eBay, or (ii) that eBay  
 23        knew of HJA’s alleged wrongful behavior and filed to protect Plaintiff and other class members  
 24        from it.” (Mot. Dismiss 6). However, *Gentry* involved a claim of eBay’s alleged liability for a  
 25        third party’s sale of forged autographs—where eBay did not itself commit any fraud—and cannot  
 26        be used to support Defendant’s position here. *See id.* In *Gentry*, plaintiffs alleged that eBay had  
 27        engaged in *negligent misrepresentation* by (i) posting their co-defendant’s fraudulent statements  
 28

1 and (ii) by publishing positive feed-back on eBay's "Feedback Forum." *Id.* at 832–35.<sup>3</sup> The court  
 2 correctly found that in both instances eBay was merely publishing someone else's statements  
 3 (either those of eBay's co-defendant or of the participants on the "Feedback Forum") and that  
 4 eBay could not be held liable for the statements of others. *See id.* Here, eBay is accused of  
 5 making its *own* misrepresentations and of doing so in order to inflate its *own* profits. Thus,  
 6 *Gentry* is totally inapposite, and eBay's motion should be denied.

7       **B. eBay is Attempting Improperly to Convert the CDA from a Shield into a**  
 8       **Sword in the Service of Fraud**

9       Defendant has long known of the problem of shill bidding—having been sued for this  
 10 before—and may not seek relief from its liability through clever arguments regarding the CDA.  
 11 Courts have recognized and applied the legal principle that a defendant may properly rely upon a  
 12 statute as a defensive shield against a claim, but may be equitably estopped from using a statute  
 13 as a sword in an attempt to profit unjustly from its own fraud. *See, e.g., Katz v. A.J. Ruhlman &*  
 14 *Co.*, 69 Cal. App. 2d 541 (Cal. Ct. App. 1945) (probate administrator told defendant it need not  
 15 file a formal claim and was then was equitably estopped from refusing payment because no claim  
 16 was filed); *Tresway Aero. Inc. v. Superior Court*, 5 Cal.3d 431, 440 (Cal. 1971) (explaining that  
 17 "[a] person may not lull another into a false sense of security by conduct causing the latter to  
 18 forebear to do something which he otherwise would have done and then take advantage of the  
 19 inaction caused by his own conduct"). "Equitable estoppel focuses on the defendant's wrongful  
 20 actions preventing the plaintiff from asserting his claim." *See Leong v. Potter*, 347 F.3d 1117,  
 21 1123 (9th Cir. 2003) (explaining equitable estoppel but declining to apply it where the  
 22 defendant's actions did not prevent the plaintiff from asserting a claim). Indeed, "[a] finding of  
 23 equitable estoppel rests on the consideration of a non-exhaustive list of factors, including . . .  
 24 evidence of improper purpose on the part of the defendant, or of the defendant's actual or  
 25 constructive knowledge of the deceptive nature of its conduct . . ." *See Santa Maria v. Pacific*

26       <sup>3</sup> Plaintiffs *Gentry* had further alleged that eBay had negligently stated that a gold star rating in  
 27 the "Feedback Forum" was "worth its weight in gold." *Id.* at 835. The court found that eBay  
 28 could not be held liable for such a statement since it is a clear statement of opinion. *Id.* Here,  
 Defendant eBay's statements regarding their live auctions (i.e., that they are carefully screened)  
 are clearly factual.

1      *Bell*, 202 F.3d 1170, 1176 (9th Cir. 2000) (outlining factors considered when applying equitable  
 2      estoppel but declining to apply it in this case). Defendant here knew about the shill bidding, and  
 3      intended to profit from it, so Defendant may not seek refuge in the CDA's protections.

4            In 2005, Defendant was sued for shill bidding conducted during its live auctions, a  
 5      manifestly perennial problem. *See* First Amended Complaint, *Farris v. GoAntiques, Inc.*, No.  
 6      2:05-CV-227 (S.D. Ohio June 24, 2005). At that time, eBay invoked the CDA. *See* eBay Inc.'s  
 7      Notice of Motion and Motion to Dismiss Plaintiff's First Amended Complaint at 2, 4–14, *Farris*  
 8      *v. GoAntiques, Inc.*, No. 2:05-CV-227 (S.D. Ohio Mar. 31, 2006). *After* eBay invoked the same  
 9      CDA defense in 2005 and *after* eBay had been put on notice that shill bidding was common on  
 10     live auction sites, eBay intentionally made further misrepresentations regarding the safety and the  
 11     careful screening of the live auctions, relying on a perceived immunity allegedly conferred by the  
 12     CDA.

13            The wrongful nature of eBay's actions here is evident. eBay is not using the CDA as  
 14     intended: a safe-harbor designed to absolve innocent interactive computer service providers from  
 15     third party liability and foster freedom of expression on the Internet. *See* 47. U.S.C. § 230(b)  
 16     (summarizing the various policy goals of the CDA). Rather, eBay has concluded that the CDA  
 17     makes eBay untouchable and is thus now relying on the CDA in order to make knowing  
 18     misrepresentations to consumers for profit. eBay has wrongfully interpreted the CDA as a  
 19     facilitator of consumer fraud, and thus, eBay should be estopped from relying on it.

20            **C.      The User Agreement Does Not Shield eBay from Liability for its**  
 21            **Misconduct**

22            1.      The User Agreement Does Not Immunize Defendant from its Own Fraud  
 23            Defendant eBay's User Agreement ("User Agreement") does not insulate Defendant from  
 24     liability for its own fraud, so Defendant's reliance upon the User Agreement in this case is  
 25     unavailing. Defendant asserts that the User Agreement immunizes eBay from *any* liability for  
 26     misrepresentations made to consumers. (Mot. Dismiss 11.) However, the sections of the User  
 27     Agreement on which Defendant relies all contemplate Defendant's non-liability ("as a passive  
 28     conduit") for the actions of auction houses, *not* for its own actions. *See id.* However, the User

1 Agreement is simply not relevant here since Defendant eBay is being accused of *directly*  
 2 *committing fraud.* (Compl. ¶¶ 15–24.)

3 As recently as 2005, eBay knew that shill bidding was rampant on the live auctions  
 4 website. Yet, eBay itself chose to lie to consumers and misstate the safety of the auctions and  
 5 indicate that they were “carefully screened.” As the Complaint clearly states, this is Defendant  
 6 eBay’s fraud alone. Thus, eBay is not a mere passive conduit here, and the user agreement is  
 7 inapplicable.

8           2.       The User Agreement Is Void Because it Was Procured by Fraud

9           In addition, the User Agreement between Plaintiff and eBay is void because it was  
 10 procured by fraud. Fraud in the inducement occurs when a party’s “consent is *induced* by fraud,”  
 11 even though he may fully understand what he is signing. *Hotels Nevada v. L.A. Pacific Center,*  
 12 *Inc.*, 144 Cal. App. 4th 754, 763 (Cal. Ct. App. 2006) (quoting *Ford v. Shearson Lehman*  
 13 *American Express, Inc.*, 180 Cal. App. 3d 1011, 1028 (Cal. Ct. App. 1986) (emphasis in  
 14 original)).

15           Here, before Plaintiff saw the User Agreement, she had already been exposed to  
 16 Defendant’s misrepresentations that the auctions were “safe auctions” that were “carefully  
 17 screened,” and these misrepresentations were designed to induce Plaintiff to accept the User  
 18 Agreement and to utilize Defendant eBay’s services. Despite Defendant’s argument, no  
 19 disclaimer can mitigate the fraudulent nature of these misrepresentations. Thus, the User  
 20 Agreement is void and does not bar any claims against Defendant, and Defendant’s Motion to  
 21 Dismiss should be denied.

22           D.       eBay Should Be Held Liable for its Unjust Enrichment and Negligence

23           3.       Plaintiff Has Adequately Pled a Claim for Unjust Enrichment

24           Defendant eBay argues for the dismissal of Plaintiff’s unjust enrichment claim by relying  
 25 on one case—*McBride v. Boughton*, 123 Cal.App.4th 379 (Cal. Ct. App. 2004)—to suggest that  
 26 there is no cause of action for unjust enrichment in California. (Mot. Dismiss 13). However,  
 27 Defendant too selectively quotes *McBride*, which does not substantiate Defendant’s overbroad  
 28 contention. The court in *McBride* states that “[u]njust enrichment is not a cause of action,

1 however, or even a remedy, but rather a general principle, underlying various legal doctrines and  
 2 remedies. *It is synonymous with restitution.*" *Id.* at 387 (internal quotations and ellipses omitted)  
 3 (emphasis added). The court then construed McBride's unjust enrichment claim as one for  
 4 restitution. *See id.*; *see also Lauriedale Assocs. Ltd. v. Wilson*, 7 Cal. App. 4th 1439, 1448 (Cal.  
 5 Ct. App. 1992) (similarly construing a claim for unjust enrichment as a valid one for restitution).

6 As both *McBride* and *Lauridale Associates* illustrate, courts essentially read claims of  
 7 unjust enrichment as claims for restitution and will not dismiss claims merely because they are  
 8 labeled as "unjust enrichment." In fact, it should be emphasized that "there is no particular form  
 9 of pleading necessary to invoke the doctrine' of restitution." *See Dinosaur Dev. Co. v. White*, 216  
 10 Cal. App. 3d 1310, 1315 (Cal. Ct. App. 1989) (quoting *Frank v. Tavares*, 142 Cal. App. 2d 683,  
 11 689 (Cal. Ct. App. 1956)).

12 Here, the Complaint actually uses the term restitution. (Compl. ¶ 150.) Indeed, Defendant  
 13 eBay is engaging in a game of semantics; and whether the cause of action is labeled unjust  
 14 enrichment or restitution, Defendant is liable.

15 4. Plaintiff Has Stated a Valid Negligence Claim against Defendant

16 Plaintiff has sufficiently made out a claim against Defendant for negligence, and  
 17 Defendant's arguments to the contrary fail to address the nature of the allegations in Plaintiff's  
 18 Complaint. Defendant argues that negligence applies only for injuries suffered in tort, not for  
 19 breaches of contract, and, accordingly, that Plaintiff's Complaint should be dismissed. (Mot.  
 20 Dismiss 13–14.) Defendant is being sued for fraud, not breach of contract. Accordingly,  
 21 Defendant's reliance on *Erlich v. Menezes*, 21 Cal. 4th 543 (Cal. 1999) (holding that a defendant  
 22 may not be liable for negligent breach of contract), is misplaced, as *Erlich* involved only a claim  
 23 of breach of contract, not of fraud. Therefore, Defendant's arguments with respect to both unjust  
 24 enrichment and negligence must fail, and Defendant's motion should be denied.<sup>4</sup>

25 E. Plaintiff's Fraud Claim Is Properly Alleged

26 Contrary to Defendant's assertion, Plaintiff has adequately and properly pled reliance.

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27 28 <sup>4</sup> Plaintiff concedes that Defendant eBay is not liable as a traditional auctioneer under the  
 applicable California statute and thus withdraws this claim as to Defendant eBay.

1 Plaintiff's Complaint clearly states that Plaintiff has relied on eBay's statements. (Compl. ¶ 260.)  
 2 Moreover, the higher pleading standard of "Rule 9(b) applies to the specifics of alleged  
 3 misrepresentations, but the notice pleading requirements of Rule 8 apply to other aspects of the  
 4 plaintiff's complaint, such as . . . reliance." *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1264  
 5 (N.D. Cal. 2006) (quoting *Ind. Bell Tel. Co. v. Ward*, No. IP 02-170-C H/K, 2002 WL 32067296  
 6 (S.D. Ind. 2002)). Plaintiff has specifically alleged reliance and is not held to a higher standard  
 7 here. Defendant's argument fails, and Defendant's motion should be denied.

8 **II. PRAYER FOR RIGHT TO AMEND IN THE ALTERNATIVE**

9 After a response to a complaint has been made, "a party may amend the party's pleading  
 10 only by leave of court or by written consent of the adverse party." Fed. R. Civ. P. Rule 15(a).  
 11 "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that  
 12 the complaint could not be saved by amendment." *Eminence Capital, LLC v. Aspeon, Inc.*, 316  
 13 F.3d 1048, 1052 (9th Cir. 2003) (permitting the plaintiffs to amend because plaintiffs' claims  
 14 were not frivolous and were pled in good faith). Thus, if the Court disagrees with Plaintiff's  
 15 arguments and believes that the Complaint should be dismissed, Plaintiff respectfully request the  
 16 right to amend the Complaint so that it may plead Plaintiff's causes of action in a manner found  
 17 proper by this Court.

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1 **CONCLUSION**

2 The Complaint tells a story of fraud and other misconduct perpetrated by Defendant eBay,  
3 alone and in concert with Defendant HJA, and, therefore, should not be dismissed, either in whole  
4 or in part.

5 Dated: San Francisco, California  
6 December 6, 2007

Respectfully submitted,

7 /s/ Matthew A. Siroka  
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† Admission pending to the New York State Bar.